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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CHARLES SEIFE,

Plaintiff,

vs.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

Defendant.

Case No. 1:19-cv-19-5190

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act
Administrative Procedure Act

Plaintiff, Charles Seife, ("Plaintiff" or "Seife"), alleges as follows:

INTRODUCTION

1. This action is premised upon, and consequent to, violations of both the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.*, or, in the alternative, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq.* It challenges the unlawful failure of the Defendant, the United States Environmental Protection Agency ("EPA"), to respond to Plaintiff's four FOIA requests and an appeal within the time and in the manner required by FOIA. Consequently, the EPA is unlawfully withholding information responsive to Plaintiff's FOIA requests that do not fall within the scope of FOIA's exemptions to mandatory disclosure.

2. The purpose of the FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). The FOIA therefore requires federal agencies to disclose records to any person upon request unless the information falls within one of nine narrow disclosure exemptions listed in the Act. *See* 5 U.S.C. § 552(a)(3)(A), (b). Except in unusual circumstances, federal agencies generally must determine within twenty business days whether requested records are exempt from withholding and, if they are not, the agency must “promptly disclose” the records to the requester. 5 U.S.C. §§ 552(a)(6)(A)(i); *id.* at (a)(3)(A), (a)(6)(C)(i).

3. The FOIA requests at issue in this case generally seek information relating to the EPA’s interactions with the press and the manner and extent to which it seeks to control the media’s coverage of the Agency. Specifically at issue is EPA’s apparent efforts to manage its public profile by limiting access to information to only “friendly” media and conversely punishing members of the press — by limiting access — that EPA deems insufficiently “friendly.” Also at issue are the tools the Agency employs to manipulate the flow of information through the timing, scope and manner in which information is released by the EPA to the press and the types of restrictions imposed on the media’s use of that information. Finally, Plaintiff seeks information relating to the Agency’s processing of FOIA requests such as how it assigns requests to queues and how it calculates estimated completion dates.

4. The EPA violated the FOIA’s provisions in processing Plaintiff’s information requests. First, the Agency has failed to release information that do not properly fall within the ambit of any of FOIA’s disclosure exemptions. Second, EPA failed to issue a final determination on Plaintiff’s administrative requests and appeal within the time allowed by the Act. Third, EPA has repeatedly failed to provide Plaintiff with accurate estimated completion dates (ECDs) for his information requests as required by FOIA.

5. Plaintiff recognizes the realities of EPA's workload and has been more than willing to give the Agency additional time to make the required determinations and to disclose requested records in this and many other matters. But in this case EPA has missed every applicable deadline while showing little sign that it will ever actually disclose the requested records to Plaintiff on a timeline that will allow him to use them to provide meaningful public oversight of the Agency's operations and activities.

6. Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, information to which he is entitled and for which no valid disclosure exemption applies. Defendant violated the statutory mandates and deadlines imposed by FOIA through its failure to provide final determinations resolving Plaintiff's FOIA requests and appeal within the time and manner required by law. Additionally, Defendant has unlawfully withheld certain information responsive to Plaintiff's requests by applying FOIA's disclosure exemptions in an overly broad manner not supported by the Act's clear language. Accordingly, Plaintiff seeks declaratory relief establishing that Defendant has violated the FOIA, or in the alternative, the APA. Plaintiff also seeks injunctive relief directing Defendant to promptly provide Plaintiff with the requested material.

JURISDICTION, VENUE AND BASIS FOR RELIEF

7. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district because the Plaintiff resides within this judicial district. Assignment in this district is proper for the same reason.

9. Declaratory relief is appropriate under 28 U.S.C. § 2201.
10. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

11. Plaintiff, Charles Seife, is a professor of journalism at New York University as well as an award-winning reporter and author who is both widely published and read. In addition to having published six critically acclaimed books on mathematical and scientific subjects, his journalism has appeared in numerous newspapers and magazines, including *The New York Times*, *The Washington Post*, *The Philadelphia Inquirer*, *Science*, *The Los Angeles Times*, *The Economist*, *Smithsonian*, *Discover*, *Scientific American*, and many other publications. He has performed a number of investigations of how federal agencies handle — and mishandle — instances of scientific misconduct in clinical trials. These investigations have been published by *Scientific American*, *ProPublica* and *Slate*, and have led to a peer-reviewed publication in *JAMA Internal Medicine*. Seife is the requester of the records which Defendant is now withholding. He has requested this information because he is developing several stories about a number of EPA policies and actions that may undermine the public trust in the Agency. Specifically, he is investigating the degree to which the EPA is attempting to place possibly unconstitutional constraints on the flow of information to the press and to the public, and may be waging a campaign to undermine the reputations of journalists who write stories critical of the agency. The information Plaintiff requests is intended to allow the public to examine EPA's behavior with regard to transparency with the public and with the press. There exists substantial public interest in this information, and the Plaintiff intends to write one or more publications based upon the contents of these documents. The records sought in this action are requested in support of these efforts.

12. Defendant United States Environmental Protection Agency, is an agency of the executive

branch of the United States government and is in possession, custody, or control of the records sought by Plaintiff, and as such, it is subject to the FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

13. FOIA imposes strict and rigorous deadlines on federal agencies. The Act requires a federal agency that receives a FOIA request to determine whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination to the requester within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). The 20-business-day period commences on the date on which the request is first received by the appropriate component of the agency, “but in any event not later than ten days after the request is first received by any component of the agency” that is designated in the agency’s regulations to receive requests under FOIA. *Id.* If the agency determines the records are not exempt from public disclosure, the agency is required to make the requested records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A).

14. If the requester appeal an agency’s determination, the agency must make a determination with respect to that appeal within 20 business days. 5 U.S.C. § 552(a)(6)(A)(ii).

15. Congress set forth the circumstances in which federal agencies may take longer than 20 business days to make the initial determination. The agency may toll the 20-business-day deadline for up to ten additional business days if the agency is waiting for information that it has reasonably requested from the requester. 5 U.S.C. § 552(a)(6)(A)(ii)(I).

16. The agency may also toll the 20-business-day deadline for up to ten additional business days if it needs to clarify with the requester any issues regarding fee assessment. 5 U.S.C. § 552(a)(6)(A)(ii)(II). If the agency faces “unusual circumstances,” the agency may extend the 20-business-day deadline if the agency sets forth in writing “the unusual circumstances for such

extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). No extension may exceed 10 business days unless the agency: (1) provides written notice to the requester explaining the “unusual circumstances” requiring an extension; (2) establishes the date on which the agency expects to make the determination; and (3) gives the requester “an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” 5 U.S.C. § 552(a)(6)(B)(ii).

17. Under FOIA, “unusual circumstances” are defined as “the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request[,]” or “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request,” or “the need for consultations ... with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

18. If the agency fails to meet FOIA’s disclosure deadlines, including the deadline to determine within 20 business days whether to respond to the request, the agency may not charge the requester for the costs incurred in searching for or duplicating the requested documents unless unusual or exceptional circumstances apply. 5 U.S.C. § 552(a)(4)(A)(viii).

19. Unless an agency subject to FOIA properly establishes a different timeline for disclosing responsive records, FOIA’s mandate to make public records “promptly available” to a requester requires federal agencies to provide responsive records to a requester within or shortly after the 20-business-day deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).

20. FOIA mandates that every federal agency “(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to

process and provide to each person making a request the tracking number assigned to the request; and (B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7).

21. An agency may avoid disclosure of information responsive to a FOIA request only if the agency proves that the requested documents fall within one of the nine enumerated exemptions to the general disclosure requirement. *See* 5 U.S.C. § 552(b)(1)–(9). FOIA requires an agency withholding information responsive to a FOIA request must provide the requester with “the reasons therefore.” 5 USC § 552(a)(6)(A)(i).

22. Consistent with encouraging disclosure, the exemptions under § 552(b) are discretionary, not mandatory. *Chrysler Corp. v. Brown*, 441 U.S. 281, 291 (1979). “Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency’s obligation to disclose; it does not foreclose disclosure.” *Id.* at 292.

23. An agency bears the burden of proving that a requested document falls within one of the nine exemptions. *See Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (“Under FOIA, ‘the burden is on the agency to sustain its action.’”); *Assembly of State of California v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (“The government has the burden to prove that a requested document falls within one of FOIA’s exemptions.”).

24. Given the policy behind the FOIA, the federal courts have consistently refused to allow agencies to meet their burden of proving the requested documents fall within one of the FOIA’s exemptions by making conclusory and generalized allegations of confidentiality. “We repeat, once again, that conclusory assertions of privilege will not suffice to carry the Government’s

burden of proof in defending FOIA cases.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980); *see also Anderson v. Dep’t of Health & Human Servs.*, 907 F.2d 936, 941 (10th Cir. 1990) (“The district court must determine whether all of the requested materials fall within an exemption to the FOIA and may not simply conclude that an entire file or body of information is protected without consideration of the component parts.”).

25. “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” *Anderson*, 907 F.2d at 941. EPA cannot simply redact entire records or pages if a small portion is subject to an exemption. *See Oglesby v. U.S. Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (“If a document contains exempt information, the agency must still release ‘any reasonably segregable portion’ after deletion of the nondisclosable portions.”) (quoting 5 U.S.C. § 552(b)). “[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.” *Arieff v. Dep’t of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983).

26. A U.S. district court has jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

27. If the government can show that “exceptional circumstances” exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. 5 U.S.C. § 552(a)(6)(C)(i). Notably, the term “exceptional circumstances” does *not* include a delay that results from a predictable agency workload of FOIA requests, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. 5 U.S.C. § 552(a)(6)(C)(ii).

28. Agency action arising under FOIA has also been subject to judicial review under the APA. See, e.g., *Oregon Natural Desert Ass'n. v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D.Or. 2006) (finding that violation of the FOIA's decision deadline constitutes APA violation for an agency action that is not in accordance with the law), *affirmed in part, reversed on other grounds*, *Oregon Natural Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

29. Under the judicial review provisions of the APA, district courts are authorized to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts must also set aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or made without observation of required procedures. 5 U.S.C. § 706(2).

STATEMENT OF OPERATIVE FACTS

30. On June 16, 2017, via the FOIAOnline portal, Plaintiff submitted a FOIA request for certain documents relating to Defendant's press policies. As part of this request, Plaintiff requested an estimated completion date. The same day, the portal sent an automated message acknowledging the submission, and gave the request a tracking number: **EPA-HQ-2017-008505**. The estimated completion date of that request, apparently generated automatically was September 6, 2017.

31. On September 5, 2017, via the FOIAOnline portal, Plaintiff submitted a FOIA request for certain documents relating to Defendant's attack on the reputation of Michael Biesecker, an Associated Press reporter. As part of this request, Plaintiff requested an estimated completion date. The same day, the portal sent an automated message acknowledging the submission, and gave the request a tracking number: **EPA-HQ-2017-011134**. The estimated completion date of that request, apparently generated automatically was October 3, 2017.

32. On March 29, 2018, via e-mail, Plaintiff notified Defendant that the estimated completion dates and statutory deadlines for both Request **EPA-HQ-2017-008505** and **EPA-HQ-2017-011134** had passed, and again requested an estimated completion date.

33. On April 3, 2018, via e-mail, Plaintiff again asked Defendant for estimated completion dates, for both FOIA 2017-8505 and 2017-11134 as he had heard nothing from Defendant.

34. On April 3, 2018, via e-mail, Plaintiff submitted a FOIA request for documents concerning possibly unconstitutional conduct by Defendant having to do with a press conference held that day -- to which the EPA invited only “friendly” press. Plaintiff requested expedited processing on the basis that Plaintiff was (a) a person primarily engaged in disseminating information to the public and (b) there is a particular urgency to inform the public about EPA’s actions that appeared to violate the First Amendment of the United States Constitution. The following day, Plaintiff received an automated message from the FOIAOnline portal acknowledging the submission and gave the request a tracking number: **EPA-HQ-2018-006186**. The estimated completion date of that request, apparently generated automatically was May 3, 2018.

35. On April 13, 2018, via e-mail, Plaintiff reminded Defendant that the ten-day statutory deadline for ruling on expedited processing was approaching, and asked for a date for determining whether he would get expedited processing as well as for an estimated completion date.

36. On April 16, 2018, via e-mail, Plaintiff notified Defendant that it had not met the ten-day statutory deadline for ruling on expedited processing, and requested a date for determining whether he would be granted expedited processing. He also asked for an estimated completion date for Request **EPA-HQ-2018-006186**.

37. On April 27, 2018, Plaintiff timely appealed Defendant's decision deny expedited processing of Request **EPA-HQ-2018-006186**. The FOIAOnline portal automatically generated a tracking number of **EPA-HQ-2018-007131** and an estimated completion date of May 25, 2018.

38. On June 1, 2018, Defendant sent Plaintiff three separate emails regarding his ongoing FOIA requests. The emails seemed automatically generated and provided estimated completion dates that, suspiciously, were each precisely 388 days from the date of submission: **EPA-HQ-2017-008505** was given an ECD of December 12, 2018; **EPA-HQ-2017-011134** an ECD of March 1, 2019, and **EPA-HQ-2018-006186** an ECD of September 30, 2019.

39. The generic ECDs of 388 days do not reflect the specific nature or scope of Plaintiff's particular FOIA requests.

40. On June 18, 2018, concerned that Defendant was not properly handling FOIA requests, Plaintiff submitted a FOIA request via email for certain documents discussing Defendant's FOIA policy and compliance with FOIA regulations. The same day, Plaintiff received an automated message from the FOIAOnline portal acknowledging the submission and gave the request a tracking number: **EPA-HQ-2018-09129**. On July 19, 2018, Plaintiff requested an estimated completion date for that request. The automatically generated estimated completion date of that request, according to the FOIAOnline portal, was, and remains, January 15, 2019.

41. On August 6, 2018, Defendant e-mailed Plaintiff asking whether he was still interested in pursuing appeal **EPA-HQ-2018-007131**. Plaintiff answered in the affirmative, and Defendant acknowledged by email Plaintiff's intention to proceed with the appeal.

42. In mid-December, 2018, Plaintiff received a telephone call from Larry Gottesman, Defendant's FOIA officer. Defendant apologized for the delays and promised prompt resolution of request **EPA-HQ-2018-09129**. Mr. Gottesman mentioned that the request had been tasked to the "simple" queue. Plaintiff requested estimated completion dates of his request, which Defendant did not provide.

43. As of the filing of this lawsuit, Plaintiff has not received any of the requested documents, or any final decision on his outstanding FOIA requests **EPA-HQ-2017-008505**, **EPA-HQ-2017-**

011134, EPA-HQ-2018-006186, or EPA-HQ-2018-09129. Further, he has not received a final decision on his appeal **EPA-HQ-2018-007131.**

44. The FOIA requires an agency to issue a final determination resolving a FOIA request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

45. Defendant failed to issue a final decision on Plaintiff's FOIA requests **EPA-HQ-2017-008505, EPA-HQ-2017-011134, EPA-HQ-2018-006186, or EPA-HQ-2018-09129** within 20 business days of their submission to Defendant request as required by 5 U.S.C. § 552(a)(6)(A)(i).

46. Defendant failed to provide a written notice to the Plaintiffs asserting that "unusual circumstances" prevented it from compliance with FOIA's decision deadline and providing the date on which the Agency expected to make the determination on FOIA requests **EPA-HQ-2017-008505, EPA-HQ-2017-011134, EPA-HQ-2018-006186, or EPA-HQ-2018-09129.** 5 U.S.C. § 552(a)(6)(B)(ii).

47. The deadlines for issuing a final determination of Plaintiff's FOIA requests **EPA-HQ-2017-008505, EPA-HQ-2017-011134, EPA-HQ-2018-006186, or EPA-HQ-2018-09129** have elapsed.

48. None of FOIA's nine exemptions to mandatory disclosure apply to the information currently being withheld by the EPA that is responsive to Plaintiff's FOIA request.

49. As of the date this action was filed, the EPA has not provided a final determination on Plaintiff's FOIA requests **EPA-HQ-2017-008505, EPA-HQ-2017-011134, EPA-HQ-2018-006186, or EPA-HQ-2018-09129** which are pending with the Agency.

50. As of the date this action was filed, with the exception of the September 30, 2019 ECD for **EPA-HQ-2018-006186**, all ECDs provided by the EPA have lapsed and the Agency has not provided Plaintiff with new estimated completion dates for the FOIA requests and appeal currently pending with Defendant.

51. Because the EPA has not provided a final determination on Plaintiff's FOIA requests **EPA-HQ-2017-008505**, **EPA-HQ-2017-011134**, **EPA-HQ-2018-006186**, or **EPA-HQ-2018-09129**, Plaintiff has not filed an administrative appeal of any of these requests and therefore has constructively exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552(a)(6)(A), (a)(6)(C).

52. The FOIA requires an agency to issue a final determination resolving a FOIA appeal within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(ii).

53. Defendant failed to make a final determination within 20 business days from receipt of Plaintiff's FOIA appeal **EPA-HQ-2018-007131** as required by 5 U.S.C. § 552(a)(6)(A)(ii).

54. Defendant failed to provide a written notice to the Plaintiffs asserting that "unusual circumstances" prevented it from compliance with FOIA's appeal decision deadline and providing the date on which the Agency expected to make the determination. 5 U.S.C. § 552(a)(6)(B)(ii).

55. The deadline for issuing a final determination of Plaintiff's FOIA appeal **EPA-HQ-2018-007131** has elapsed.

56. As of the date this action was filed, the EPA has not provided a final determination on Plaintiff's FOIA appeal **EPA-HQ-2018-007131** which is pending with the Agency.

57. Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute this claim.

58. Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. § 552(a)(4)(E)(ii)(II).

CAUSES OF ACTION

COUNT I

VIOLATION OF THE FREEDOM OF INFORMATION ACT: CONSTRUCTIVE DENIAL/UNLAWFUL WITHHOLDING

59. The allegations made in all preceding paragraphs are realleged and incorporated by reference.
COMPLAINT

ence herein.

60. Plaintiff has a statutory right to the records he seeks, and there is no legal basis for Defendant EPA to assert that any of FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).

61. Defendant EPA violated Plaintiff's rights in this regard by failing to comply with FOIA's decision deadlines and thus constructively withholding information responsive to Plaintiff's FOIA requests.

62. Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ FOIA's provisions in information requests to Defendant EPA in the foreseeable future.

63. Plaintiff's professional activities will be adversely affected if Defendant EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

64. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant EPA will continue to violate the rights of Plaintiff to receive public records under the FOIA.

65. Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT II
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
UNLAWFUL APPLICATION OF DISCLOSURE EXEMPTIONS

66. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

67. Plaintiff has a statutory right to the records he seeks, and there is no legal basis for Defendant EPA to assert that any of FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).

68. Defendant EPA violated Plaintiff's rights in this regard by unlawfully withholding information responsive to Plaintiff's FOIA requests numbered 2014-3702, 2015-1143 and 2015-1144, based on the improper and overly broad application of FOIA's exemptions to mandatory information disclosure.

69. Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ FOIA's provisions in information requests to Defendant EPA in the foreseeable future.

70. Plaintiff's professional activities will be adversely affected if Defendant EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

71. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant EPA will continue to violate the rights of Plaintiff to receive public records under the FOIA.

72. Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

**COUNT III
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
DECISION DEADLINE VIOLATIONS**

73. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

74. Plaintiff has a statutory right to have Defendant EPA process his FOIA requests and appeal in a manner which complies with FOIA. Plaintiff's rights in this regard were violated when the Defendant EPA unlawfully delayed its response to his information requests and appeal beyond the determination deadlines imposed by the FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i), (ii).

75. Defendant EPA is unlawfully withholding public disclosure of information sought by Plaintiff, information to which he is entitled and for which no valid disclosure exemption applies.

76. Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ FOIA's provisions in information requests to Defendant EPA in the foreseeable future.

77. Plaintiff's professional activities will be adversely affected if Defendant EPA is allowed to continue violating FOIA's decision deadlines as it has in this case.

78. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant EPA will continue to violate the rights of Plaintiff to receive public records under the FOIA.

79. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT IV
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
FAILURE TO PROVIDE AN ACCURATE ESTIMATED DATE ON WHICH THE
AGENCY WILL COMPLETE ACTION ON PLAINTIFF'S
FOIA REQUESTS AND APPEAL

80. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

81. FOIA requires federal agencies to provide the requester with information about the status of the agency's response to the request, including an estimated date on which the agency will complete action on the request. 5 U.S.C. § 552(a)(7)(B)(ii).

82. Plaintiff asked EPA numerous times for estimated dates of completion for his pending FOIA requests and appeal. In so doing, Plaintiff invoked 5 U.S.C. § 552(a)(7)(B)(ii).

83. Defendant EPA has repeatedly failed to provide accurate estimated dates of completion for Plaintiff's FOIA requests and appeal at issue in this case. To the extent that EPA asserted any ECDs, they appear to have been automatically generated without any regard to the specific nature of the request or appeal at issue and the actual estimated time it would take to resolve.

84. With the exception of the September 30, 2019 ECD for **EPA-HQ-2018-006186**, all ECDs provided by the EPA in this matter have lapsed and the Agency has not provided Plaintiff with new estimated completion dates for the FOIA requests and appeal currently pending with Defendant.

85. Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ FOIA's provisions in information requests to Defendant EPA in the foreseeable future.

86. Plaintiff's professional activities will be adversely affected if Defendant EPA is allowed to continue violating FOIA's requirement to provide estimated completion dates as it has in this case.

87. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant EPA will continue to violate the rights of Plaintiff to receive public records under the FOIA.

88. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT V
VIOLATION OF FOIA AND THE APA:
ENGAGING IN A PATTERN, PRACTICE OR POLICY OF UNLAWFUL CONDUCT
OF FAILURE TO PROVIDE ACCURATE ESTIMATED COMPLETION DATES

89. Plaintiff hereby incorporates by reference the allegations in the preceding paragraphs.

90. EPA has adopted and is engaged in a pattern, practice, or policy of violating FOIA's procedural requirements when processing FOIA requests and appeals by repeatedly refusing to issue an accurate estimated date on which EPA will complete action on such requests and appeals as required by 5 U.S.C. § 552(a)(7)(B)(ii). To the extent that EPA asserted any ECDs in this case, they appear to have been automatically generated without any regard to the specific nature of the request or appeal at issue and the actual estimated time it would take to resolve.

91. On information and belief, EPA has a pattern, practice, or policy of not providing requesters with accurate estimated dates of completion for FOIA requests and appeals and instead applying generic dates that do not reflect the specific nature or scope of a particular request or appeal.

92. In this case, EPA has engaged in a pattern, practice, or policy of violating FOIA in responding to Plaintiff's request and appeal by repeatedly failing to provide accurate estimated dates by which EPA will complete Plaintiff's request and appeal.

93. EPA's pattern, practice, or policy of failing to provide accurate estimated completion dates for processing information requests and associated appeals violates the intent and purpose of FOIA.

94. EPA's patterns, practices, or policies for processing FOIA requests and appeals have resulted in violations of Plaintiff's rights to the lawful implementation of FOIA as alleged above.

95. Additionally, EPA's patterns, practices, or policies for processing FOIA requests and appeals are likely to result in future violations of FOIA that will harm Plaintiff because Plaintiff is likely to continue seeking public records from EPA.

96. EPA's patterns, practices, or policies of unlawful conduct in violation of FOIA's clear requirement to issue an estimated date on which EPA will complete action on requests and appeals is likely to recur absent intervention by this Court.

97. EPA's pattern, practice, or policy exists, whether formal or informal in nature.

98. FOIA imposes no limits on courts' equitable power to enforce its terms, and this Court should exercise its equitable powers to compel EPA to comply with the clear requirements of FOIA and prevent EPA from continuing to apply its unlawful FOIA pattern, practice, or policy.

99. Plaintiff is entitled to a declaration that EPA's actions violated FOIA and to an injunction barring EPA from violating FOIA in the future when responding to his FOIA requests or

associated appeals. Whether granted under FOIA or the APA, declaratory or injunctive relief will clarify and settle the legal relations at issue and afford relief from the uncertainty and controversy that gave rise to these proceedings.

100. EPA's unlawful patterns, practices, or policies of violating FOIA when responding to Plaintiff's FOIA requests and appeal entitles Plaintiff to an award of reasonable attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

COUNT VI
(In the alternative to Counts I through V)
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
FAILING TO COMPLY WITH FOIA IN RESPONDING TO
PLAINTIFF'S FOIA REQUESTS AND APPEAL

101. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

102. Defendant EPA has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA consequent to its failure and refusal to issue a timely final determination on Plaintiff's administrative requests and appeal and to provide Plaintiff with specific and accurate estimated completion dates for his FOIA requests and appeal.

103. Defendant EPA has unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) issue a timely final determination of Plaintiff's administrative requests and appeal; and; (2) provide Plaintiff with specific and accurate estimated completion dates for his FOIA requests and appeal

104. Plaintiff has been adversely affected and aggrieved by the Defendant EPA's failure to comply with the mandates of FOIA. Defendant's failure and refusal to: (1) issue a timely final determination of Plaintiff's administrative requests and appeal; and; (2) provide Plaintiff with specific and accurate estimated completion dates for his FOIA requests and appeal, has injured Plaintiff's interests in public oversight of governmental operations and constitute a violation of

Defendant EPA's statutory duties under the APA.

105. Plaintiff has suffered a legal wrong as a result of the Defendant EPA's failure to comply with the mandates of FOIA. Defendant EPA's failure and refusal to: (1) issue a timely final determination of Plaintiff's administrative requests and appeal; and; (2) provide Plaintiff with specific and accurate estimated completion dates for his FOIA requests and appeal, has injured Plaintiff's interests in public oversight of governmental operations and constitute a violation of Defendant EPA's statutory duties under the APA.

106. Defendant EPA's failure and refusal to: (1) issue a timely final determination of Plaintiff's administrative requests and appeal; and; (2) provide Plaintiff with specific and accurate estimated completion dates for his FOIA requests and appeal, constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

107. Alternatively, Defendant EPA's failure and refusal to: (1) issue a timely final determination of Plaintiff's administrative requests and appeal; and; (2) provide Plaintiff with specific and accurate estimated completion dates for his FOIA requests and appeal, is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

108. Plaintiff is entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702, 706.

109. Plaintiff is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant in the form of injunctive relief to promptly provide Plaintiff all of the information sought in this action;

2. Declare Defendant's failure to disclose the information requested by Plaintiff to be unlawful under the FOIA, 5 U.S.C. § 552(a)(3), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2);

3. Declare Defendant's failure to make a timely determination on Plaintiff's administrative requests and appeal to be unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2);

4. Declare Defendant's failure to provide Plaintiff with specific and accurate estimated completion dates to be unlawful under the FOIA, 5 U.S.C. § 552(a)(7)(B)(i), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion and not in accordance with law, 5 U.S.C. § 706(2);

5. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412, or any other applicable law;

6. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

7. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted for the Court's consideration, this 3rd day of June, 2019.

s/ David Bahr
David Bahr (Oregon Bar No. 901990)
(*pro hac vice* pending)
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